IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO EX REL OIL CONSERVATION COMMISSION, EDWIN L. MECHEM, MURRAY E. MORGAN, A. L. PORTER, JR., MEMBERS OF SAID COMMISSION, TEXAS PACIFIC COAL AND OIL COMPANY, EL PASO NATURAL GAS COMPANY AND PERMIAN BASIN PIPELINE COMPANY,	)	
Relators	)	NO. 6483
vs.	)	
HON. JOHN R. BRAND, JUDGE OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF NEW MEXICO,	)	
Respondent	)	

RELATORS' REPLY BRIEF

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RELATORS' REPLY BRIEF

The parties opposing the issuance of a permanent writ of prohibition in this cause were designated Petitioners in Relators' Brief-in-Chief. In their Answer Brief they have designated themselves Respondents and will be so referred to in this Reply Brief.

Respondents failed to directly answer any of the points raised by Relators in their Brief-in-Chief. Thus, for the sake of clarity, Relators will set out each point urged by Respondents in their Answer Brief and will reply to each such point.

REPLY TO RESPONDENTS' OBJECTION TO THE STATEMENT OF THE FACTS

In their objection to Relators' Statement of the Facts, Respondents' state that "Relators failed to state that respondent has filed herein his answer, together with his certificate of having done as commanded in the alternative writ."

Relators did not so state inasmuch as the answer of Respondent, The Honorable John R. Brand, had not been filed at the time Relators' Brief-in-Chief was filed with this Court.

REPLY TO RESPONDENTS' OBJECTION TO THE STATEMENT OF THE CASE

No reply is called for except to point out that Respondents are attempting to enlarge the scope of this case beyond that raised in Relators' Application for Writ of Prohibition.

REPLY TO POINT I OF RESPONDENTS' ANSWER BRIEF WHICH POINT IS AS FOLLOWS:

POINT I

THE DISTRICT COURT AT ALL MATERIAL TIMES HAD COMPLETE JURISDICTION OF LEA COUNTY CAUSE NUMBER 16213 WHICH SAID JURISDICTION IS IN NO WISE QUESTIONED OR ATTACKED IN RELATORS' PETITION FOR WRIT OF PROHIBITION HEREIN ON FILE, AND THEREFORE PROHIBITION WILL NOT LIE.

Relators have considerable difficulty understanding how Respondents can contend that "jurisdiction is in no wise questioned or attacked in relators' petition for Writ of Prohibition herein on file." (Answer Brief, p. 4)

Paragraph 8 of the Application for Writ of Prohibition alleges that the District Court is "wholly without jurisdiction" to take additional evidence for the purpose of determining whether the Oil Conservation Commission acted in an arbitrary, capricious, unreasonable, improper or unlawful manner.

Likewise there is absolutely no merit in the statement by Respondents at page 5 of their Answer Brief, and reiterated at other places therein, to the effect that,

> "It nowhere appears in relators' petition for writ of prohibition that respondent in the aforesaid Lea County Cause No. 16213 did not have complete jurisdiction both of the parties and the subject matter, and nowhere in their brief is it argued that such jurisdiction does not exist."

Relators certainly have questioned and continue to question the jurisdiction of the District Court. We stated as follows at page 33 of our Brief-in-Chief:

> "Even though the Court has jurisdiction over the parties and the subject matter, the taking of additional evidence for the purposes proposed would amount to an excess of jurisdiction and would render the Court without jurisdiction." (Emphasis added)

To support this proposition, Relators then quoted the following statement from the case of State v. Carmody, 53 N.M. 367, 370, 208 P. 2d 1073 (1949) (Relators' Brief-in-Chief, p. 33):

> "to the extent the court proposes to exceed its jurisdiction, there is a want of jurisdiction, both over the parties and the subject matter. To such extent any judgment rendered by it would be a complete nullity and subject to collateral attack."
> (Emphasis same as in Brief-in-Chief)

The above-quoted proposition is squarely in point in the instant case. The District Court initially had jurisdiction over the parties and the subject matter, but if, as Relators contend, the Court's proposed action will be in excess of its jurisdiction, "there is a want of jurisdiction, both over the parties and the subject matter." State v. Carmody, supra.

Relators are fully cognizant of the fact that a writ of prohibition issues as a matter of right only when the "inferior court is proceeding without jurisdiction, or in excess of jurisdiction." Board of Commissioners of Guadalupe County v. District Court of Fourth Judicial District, 29 N.M. 244, 254, 223 Pac. 516, (1924); State ex rel. Swayze v. District Court of Fifth Judicial District, 57 N.M. 266, 258 P.2d 377 (1953). But Relators contend, as we did in our Brief-in-Chief (page 33), that the District Court is about to proceed in excess of its jurisdiction with the result of divesting it of jurisdiction to that extent. Hence relators take the position that we are entitled to a writ of prohibition as a matter of right.

Respondents state at page 12 of their Answer Brief that,

> "In paragraph 9 of the petition for writ of prohibition on file herein, it is alleged that if the District Court carries out its announced intention to take additional evidence, such action would be error. This is the basis, and the sole basis for relators' petition in this case." (Emphasis added)

The emphasized portion of the foregoing quotation from Respondents' Answer Brief is entirely erroneous, and Relators cannot permit the issues in this case to be confused thereby. As stated above, Relators' have questioned and continue to question the District Court's jurisdiction in the instant case to take additional evidence for the purposes announced.

As an alternative argument, however, and without in any way waiving our attack on the District Court's jurisdiction, Relators do contend that even if the Court does have jurisdiction to take the threatened action, such action would be error, and that this Court should intervene in the exercise of its discretionary power of superintending control to prohibit the commission of said error in order to save Relators from great and extraordinary hardship, costly delays and unusual burdens of expense.

Relators readily admit that the issuance of a writ of prohibition in the exercise of the power of superintending control is discretionary with this court, and as such, cannot be invoked as a matter of right. We do, however, most earnestly contend that the facts in the instant case clearly warrant the exercise of this power.

Since subpoints A and B of Point I of Respondents' Answer Brief are both devoted primarily to the argument that this is not a proper case for the exercise of superintending control, we will reply to them as a single point.

Subpoints A and B of Point I of Respondents' Answer Brief are as follows:

> A. RELATORS HAVE A PLAIN, ADEQUATE AND SPEEDY REMEDY IN THE ORDINARY COURSE OF LAW BUT IN PLACE AND STEAD THEREOF HAVE SOUGHT TO CONVERT THIS PROCEEDING INTO AND MAKE IT SERVE THE PURPOSE OF AN APPEAL OR WRIT OF ERROR.

B. RELATORS FAIL TO ALLEGE ANY FACTS SHOWING THAT IRREPARABLE LOSS OR DAMAGE WILL RESULT TO THEM IF THE RELIEF SOUGHT HEREIN IS NOT GRANTED, AND TO THE CONTRARY HAVE PLEADED FACTS FROM WHICH IT AFFIRMATIVELY APPEARS THAT SUCH IRREPARABLE LOSS OR DAMAGE WILL NOT RESULT TO THEM IN SUCH EVENT, AND THEREFORE PROHIBITION IS NOT A PROPER REMEDY, NOR DO THE CIRCUMSTANCES WARRANT THE EXERCISE OF POWERS OF SUPERINTENDING CONTROL OF THIS COURT.

A major portion of both subpoints is devoted to a discussion of general rules of law governing the ordinary case. A typical example is the excerpt from 42 Am. Jur., Prohibition, Sec. 8, page 144, quoted by Respondents at page 11 of their Answer Brief. The first sentence of that quotation is as follows:

> "In the absence of any statutory provision to the contrary, it is the general rule that prohibition, being an extraordinary writ, cannot be resorted to when ordinary and usual remedies are adequate and available." (Emphasis added)

Relators certainly do not take issue with the above-quoted language nor any of the many other similar pronouncements in Respondents' Answer Brief setting forth the general rule in ordinary cases where ordinary and usual remedies are adequate and available. The whole point of our alternative argument in support of the application for Writ of Prohibition is that this is not an ordinary case but rather an extraordinary case, and hence a proper case for the use of the extraordinary writ of prohibition.

Relators have alleged in paragraph 9 of the Application for Writ of Prohibition filed herein that our remedy by appeal is wholly inadequate for the following reasons:

(a) Remedy by appeal after the entry of final judgment or decree would be accompanied by unbearable expense and delay to relators.

(b) In order to preclude the possibility of having its action branded unreasonable, arbitrary, capricious, or improper on the basis of additional evidence which it had no opportunity to consider, Relator Oil Conservation Commission would feel compelled to present testimony in the District Court to support its action. The preparation and presentation of such testimony and exhibits would be extremely costly, time consuming and detrimental to the efficiency of the already over-burdened technical staff of Relator Oil Conservation Commission, all to the ultimate detriment of the State of New Mexico.

(c) Relator Texas Pacific Coal and Oil Company has already expended in excess of Thirty-five Thousand Dollars for reservoir studies and expert witness fees in presenting the case before the Oil Conservation Commission. If petitioners are permitted to present additional testimony, Relator Texas Pacific Coal and Oil Company must, of necessity, do likewise in order to adequately protect its interests. Preparation and presentation of such additional testimony will result in an additional expense of approximately Fifteen Thousand Dollars to said Relator.

(d) Relator El Paso Natural Gas Company has already expended in excess of Ten Thousand Five Hundred Dollars for reservoir studies and expert witness fees in presenting the case before the Oil Conservation Commission. If petitioners are permitted to present additional testimony, Relator El Paso Natural Gas Company must, of necessity, do likewise in order to adequately protect its interests. Preparation and presentation of such additional testimony will result in an additional expense of

approximately Five Thousand Dollars to said Relator.

(e) Approximately 75 exhibits and one thousand pages of transcript of testimony originally taken before the Oil Conservation Commission, which will become a part of the record in the District Court at the hearing upon the merits in Cause No. 16213, together with the proceedings had before the District Court, would necessarily be included in the record to be filed in the Supreme Court, and the expense and delay occasioned thereby would be an undue burden upon relators.

Relators again set forth the circumstances which render the instant case extraordinary at pages 34 through 36 of their Brief-in-Chief.

Nowhere in Respondents' Answer Brief do they join issue on the individual points alleged by Relators as grounds for the exercise of the superintending control of this court. Instead Respondents are content to "answer" Relators' allegations by lumping them all together and merely saying,

> "None of these contentions raise any basis upon which an application for writ of prohibition may be obtained on the grounds of inadequacy of remedy by appeal." (Answer Brief, p. 12)

The sole authority cited by Respondents in support of the above-quoted statement is the following excerpt from a general text, American Jurisprudence:

> "There is no general rule of universal application by which the adequacy or inadequacy of a remedy can be ascertained, but the question is one to be determined on the facts of each particular case, and rests, in large part, in the discretion of the court. The delay and expense of an appeal or other available remedy ordinarily furnish no sufficient reasons for holding that the remedy by appeal is not adequate or speedy, although there are many instances

> in which the expense and delay of an appeal have, in part at least, impelled the superior court to grant the writ.***"
> (Emphasis same as in Answer Brief)

Relators urge that the above-quoted excerpt from American Jurisprudence fails to support Respondents' contention. First, it is recognized therein that "the question is one to be determined on the facts of each particular case," and secondly, that "there are many instances in which the expense and delay of an appeal have, in part at least, impelled the superior court to grant the writ."

In any event, we need not concern outselves further with a discussion of the generalities of American Jurisprudence, since the question has been specifically settled once and for all in this jurisdiction by the direct and lucid holding of this Court in State v. Carmody, supra.

The test announced in the Carmody case for determining when this court will intervene in the exercise of its power of superintending control is set forth at page 378 of the New Mexico Reports in the following language:

> "The matter has been considered often enough in the cases cited, however, for us to reach some definite conclusions as to when it is appropriate to exercise the power and the means of doing so. It can be taken as settled that this control cannot be invoked to perform the office of an appeal. State v. Medler, supra. On the other hand, even though the trial court be moving within its jurisdiction and the threatened action be error only, as distinguished from a want of jurisdiction as well, this court may intervene by an appropriate writ in an exercise of its power of superintending control, if the remedy by appeal seems wholly inadequate. State v. Raynolds, supra; or where otherwise necessary to prevent irreparable mischief, great extraordinary, or exceptional hardship; costly delays and unusual burdens of expense. Albuquerque Electric Co. v. Curtis, supra." (Emphasis added).

The above-quoted language from the opinion in State v. Carmody, supra, completely refutes Respondents' argument that expense and delay furnish no sufficient reason for holding that Relators' remedy by appeal is inadequate.

On page 20 of their Answer Brief, Respondents make a half-hearted attempt to distinguish the Carmody case by arguing that the language contained therein regarding the power of superintending control is not applicable in the instant case because the Corporation Commission appeal statute is different from that of the Oil Conservation Commission. In other words, Respondents have departed from their discussion of adequacy of remedy to argue that the proposed action of the District Court would not be error. Obviously, we would never get to a discussion of adequacy of remedy unless it be first found that such threatened action would be error.

Regardless of the particular type of error involved, State v. Carmody, supra, is still the controlling case in this jurisdiction on the question of superintending control and there is no doubt but that the facts in the instant case fully meet the tests set forth in that case.

If the District Court is permitted to carry out its announced intention to take additional evidence in this case, Relators will be required to expend approximately $20,000.00 in the preparation and presentation of expert testimony and technical exhibits. All of this money will have been wasted if, on appeal, it is held that the District Court was without authority to take such additional evidence. Thus Relators' remedy by appeal in this matter would be attended by a totally unnecessary expense of $20,000.00 in addition to the usual expenses incurred in an appeal to this court. Certainly this would be an "unusual burden of expense" as that term is used in the above-quoted language from the Carmody case.

At page 18 of the Answer Brief, Respondents attempt to minimize the unusual burden of expense referred to above by comparing it with the amount of money which is ultimately at stake in this action and saying that,

> "In comparison the asserted costs for preparation of testimony and evidence necessary to refute that which may be offered by Respondents is relatively small." (Emphasis added)

Respondents would give this Court the impression that they are the only ones who have anything at stake on the ultimate outcome of Lea County Cause No. 16213. This is not the case. It is axiomatic that each side must have an equal interest in this matter. While it may be that Respondents' consider an unnecessary expenditure of $20,000.00 as being small and insignificant, it suffices to say that it is not so considered by Relators.

Turning to a discussion of Relators' allegation that costly delay would attend their remedy by appeal, Respondents urge that Relators' contention in this regard amounts to "nothing but an insubstantial phrase." (Respondents' Answer Brief, p. 13) There seems to be some confusion as to how such costly delay will occur. The delay to which Relators have referred will come about in the manner hereinafter set forth.

The District Court will carry out its announced intention to take additional evidence whereupon several days of testimony will be presented in addition to the already voluminous record taken before the Commission. In view of the serious impact of this decision on Relator Oil Conservation Commission, it will be compelled to appeal the District Court's decision to take additional evidence regardless of the decision on the merits of the case.

If, on appeal, it is determined that the District Court was not authorized to take additional evidence in this case, the matter would then have to be remanded to the District Court for retrial on the record made before the Commission. In all probability a second appeal will be taken from the District Court's second decision. Thus it can be seen how Relators will suffer costly delay by being required to engage in one unnecessary trial and at least one unnecessary appeal. This Court can prevent the costly delay referred to above by now passing on this question as requested by Relators.

The unusual burdens of expense and costly delay which we have shown to exist in this case most certainly have the effect of rendering Relators' remedy by appeal wholly inadequate. It thus becomes clear, in light of the opinion in State v. Carmody, supra, that this is unquestionably a proper case for the exercise of this Court's power of superintending control.

To summarize our reply to this point it suffices to say that the Alternative Writ of Prohibition should be made permanent because:

(1) The District Court is wholly without jurisdiction to take additional evidence in this case, and that Relators are, therefore, entitled to prohibition as a matter of right; and, in the alternative,

(2) Even if it be assumed that the District Court's proposed action would be error only, this Court should nevertheless intervene in the exercise of its power of superintending control to make permanent the Alternative Writ of Prohibition, since Relators' remedy by appeal is wholly inadequate.

REPLY TO POINT II OF RESPONDENTS' ANSWER BRIEF WHICH POINT IS AS FOLLOWS:

THE JUDICIAL REVIEW PROVIDED BY SECTION 65-3-22, N.M.S.A., 1953, IS A TRIAL DE NOVO IN THE ORDINARY SENSE OF THE TERM INCLUDING THE RIGHT TO INTRODUCE ADDITIONAL EVIDENCE.

Relators urged in their Brief-in-Chief that it is possible to interpret Section 65-3-22, supra, constitutionally by limiting the scope of review so as to prohibit the taking of additional evidence for the purposes proposed. (Relators' Brief-in-Chief, p. 20) A number of cases were cited by Relators where courts have so interpreted and limited "trial de novo" statutes, including the following: Denver & R. G. W. R. Co. v. Public Service Commission, 98 Utah 431, 100 P. 2d 552 (1940); Lloyd v. City of Gary, 214 Ind. 700, 17 N.E. 2d 836 (1938); State Board of Medical Registration and Examination, v. Scherer, ___Ind.___, 46 N.E. 2d 602 (1943); Denver & R. G. W. R. Co. v. Central Weber Sewer I District, 4 Utah 2d 105, 287 P. 2d 884 (1955).

Respondents have ignored the above-cited cases and rely upon an absolutely literal reading of the review statute (Section 65-3-22(b), supra). Relators urged that such a literal reading is unwarranted (Relators' Brief-in-Chief, p. 20), but contended that if this Court feels compelled to give this statute an absolutely literal reading, then the entire statute is unconstitutional as a violation of the constitutional separation of powers provision (Relators' Brief-in-Chief, p. 18). Relators will discuss this question more fully in their reply to Point IV.

REPLY TO POINT III OF RESPONDENTS' ANSWER BRIEF WHICH POINT IS AS FOLLOWS:

THE TRIAL COURT MUST TRY THE PENDING CASES DE NOVO AND CAN RECEIVE EVIDENCE IN ADDITION TO THE EVIDENCE SUBMITTED TO THE COMMISSION

The first contention raised by Respondents under Point III is that the "Commission decision was based solely on correlative

rights, and not on any issue of waste." (Respondents' Answer Brief, p. 27). Respondents further state:

> "The Commission Orders Nos. R-1092-A and R-1092-C made no finding with reference to waste, but determined the issue on the basis of allegedly protecting the correlative rights of the owners in the Jalmat Gas Pool..."

Similar statements can be found at other places in Respondents' Answer Brief (p. 51). Respondents have apparently failed to read the original order of which they complain (R-1092-A, which is Exhibit A in Relators' Application for Writ of Prohibition). Expressly contained in this order is the following finding (No. 3):

> "That it is necessary to continue the proration of gas production from the Jalmat Gas Pool in order to prevent waste and protect correlative rights." (Emphasis added)

Indeed there would be no jurisdiction in the Oil Conservation Commission to prorate the production of gas from the Jalmat Gas Pool under any formula unless the failure to do so would cause waste. Section 65-3-13(c), NMSA, 1953 Comp.

Apparently Respondents intend to imply that the scope of review is different when the Commission action being reviewed concerns protection of correlative rights than it is when the action being reviewed involves waste. This is an indefensible proposition. Whatever this Court may find the scope of review to be in the light of the Constitution, it is the same in either case.

Respondents next proceed to a discussion of New Mexico cases involving scope of review of actions of administrative agencies. In their treatment of this subject Respondents separate these cases according to the administrative agency involved. Such treatment might be warranted if we were here interested in a comparison of

review statutes - but the real question in this case is whether the constitutional separation of powers provision imposes a limitation on the scope of review of actions of any administrative agency exercising legislative or executive functions.

Point I of Relators' Brief-in-Chief is that "The Oil Conservation Commission is a legislative body and was acting in a legislative - administrative capacity when it entered the orders complained of." This Point has not been controverted by Respondents and must be taken as admitted.

If, as most earnestly contended by Relators, the separation of powers provision does limit the scope of review of actions of administrative agencies exercising legislative or executive functions, then such limitation is equally applicable in reviewing the action of any such agency. (See cases cited on page 20 of Relators brief) Hence there is no necessity in this case for separate treatment of cases involving appeals from various administrative agencies. This elementary principle was fully recognized by this Court in Ferguson-Steere Motor Company v. State Corporation Commission, 63 N.M. 137, 142, 314 P. 2d 894 (1957), when it stated:

> "The Commission is an administrative body and the courts are limited in their review of such bodies." (Emphasis added)

Respondents contend that the liquor control cases cited by Relators are not in point inasmuch as they can be distinguished on the basis of "right" versus "privilege."

While the distinction between "right" and "privilege" may be valid for the purpose of determining whether a property right exists, it cannot seriously be urged as a limitation on the constitutional separation of powers provision, and has not been so considered by this Court.

The decisions in Flesck v. Bureau of Revenue, 44 N.M. 194, 100 P. 2d 225 (1940) and Yarbrough v. Montoya, 54 N.M. 91, 214 P. 2d 769 (1950) were not based on a right-privilege distinction. To the contrary, both cases were grounded on the separation of powers doctrine as is shown by the following statement contained in each case:

> "Assuming the constitutionality of Sec. 1303, it did not undertake to vest in the District Court the administrative function of whether or not the permit should be granted. It gave the court authority only to determine whether upon the facts and law, the action of the Commissioner in cancelling the license was based upon an error of law or was unsupported by substantial evidence or clearly arbitrary or capricious...otherwise it would be a delegation of administrative authority to the district court in violation of the Constitution." (Emphasis added)

Respondents rely heavily on Texas cases which permit additional evidence to be introduced when commission action is challenged in the courts. It is important to note, however, that even under the rule in the Texas decisions which Respondents urge this Court to adopt, they would still be precluded from introducing evidence as to events which have occurred subsequent to the entry of the orders complained of. Trapp v. Shell Oil Co., 145 Tex. 323, 198 S. W. 2d 424, 436 (1946); Magnolia Petroleum Co. v. New Process Production Co., 129 Tex. 617, 104 S. W. 2d 1106 (1937). And this is exactly the type of evidence which the District Court proposes to receive in this case, i.e., evidence as to events which have occurred since the Commission action. (See Pretrial Order, Exhibit F of Application for Writ of Prohibition)

The Texas decisions on which Respondents rely can be distinguished inasmuch as there is no "appeal" from actions of

the Texas Railroad Commission. Rather, the statute provides for an independent action. Tex. Rev. Civ. Stat. Ann. (Vernon's) Art. 6049 (c) § 8; Kidder, The Method and Nature of Judicial Review of Orders of the Oil & Gas Division of the Railroad Commission, 33 Tex. L. Rev. 680 (1955).

In any event the judicial "review" of administrative action in Texas has been the subject of frequent and critical comment. Hyder, Exceptions to the Spacing Rule in Texas, 27 Tex. L. Rev. 481 (1949). Two of the obvious flaws in the Texas system are pointed out by Mr. Whitney R. Harris in Reappraisal of the Substantial Evidence Rule, 3 S. W. L. J. 416, 430 (1949) where he states as follows:

> "The basic difficulty with the substantial evidence rule in Texas is not that it requires an evaluation of the record considered 'as a whole', but that it is applied to a new record adduced before the court which may differ in significant respects from the record adduced before the agency.
>
> * * * *
>
> Another evil is implicit in this scheme of review. Since there must be a complete retrial of fact issues in cases appealed to the courts, the possibility exists that administrative agencies may be less inclined than otherwise properly to conduct complete administrative hearings. Evidence may be held back against the possibility of appeal to the courts... In short, the emphasis upon the judicial hearing may adversely affect the quality of the administrative hearing."

It has also been suggested that the Texas courts have been motivated to excessive review of Railroad Commission action because there is no requirement that hearings before that agency be conducted with the sanctions and safeguards attending judicial proceedings. Walker, The Application of the Substantial Evidence Rule in Appeals from Orders of the Railroad Commission, 32 Tex. L. Rev. 639, 659 (1954).

By all means this Court should firmly decline to follow the haphazard Texas rule, as did the Mississippi Supreme Court in the well-reasoned case of California Co. v. State Oil and Gas Board, 200 Miss. 824, 27 So. 2d 542 (1946). It is cumbersome, expensive and inadequate; the litigant is put to the expense of two proceedings; Two records are created which may well differ in factual content. Finally, as one eminent authority so ably stated, "why should the courts take up their time hearing such additional evidence when the legislature has established a forum for that very purpose." Netterville, Judicial Review: The 'Independent Judgment' Anomaly, 44 Cal. L. Rev. 262 (1956). This is especially true when, as in this case, the testimony heard by the agency is highly technical. See Spencer v. Bliss, 60 N.M. 16, 287 P. 2d 221 (1955).

Respondents state that "the concept of a trial de novo on appeal from an administrative agency is well known and accepted throughout the courts of this country." (Respondents' Answer Brief, p. 42) Relators contend that the concept of trial de novo is not nearly as well known nor accepted as Respondents would have this Court believe. Respondents have chosen to ignore the cases cited by Relators at page 20 of their Brief-in-Chief wherein the courts of several jurisdictions expressly denounce this concept. In this connection it is important to note that the Model State Administrative Procedure Act drafted by the National Conference of Commissioners on Uniform State Laws, and adopted by some ten states, provides that judicial review of administrative determinations shall be confined to the record made before the agency. If it is shown to the satisfaction of the court that there is additional evidence which is material, and that there were good reasons for failure to present it to the

agency, the court may order that such additional evidence be taken before the administrative agency. Model State Administrative Procedure Act § 12 (5).

REPLY TO POINT IV OF RESPONDENTS' ANSWER BRIEF WHICH POINT IS AS FOLLOWS:

THE DISTRICT COURT SHOULD MAKE ITS DETERMINATION UPON A PREPONDERANCE OF THE EVIDENCE INTRODUCED BEFORE IT AND IS NOT BOUND BY A SUBSTANTIAL EVIDENCE RULE.

Respondents state that the only possible objection to the "preponderance" provision of the review statute "is that this provision of the statute authorized the District Court to substitute its judgment for that of the Commission, and that in so providing the statute runs afoul of the separation of powers provision of the New Mexico Constitution." (Respondents' Answer Brief, p. 46).

This is the whole point of Relators. The "preponderance" provision does authorize the District Court to substitute its judgment for that of the Commission on an administrative-legislative matter. Any provision in a review statute which purports to do so is unconstitutional under the explicit pronouncement of this Court in Transcontinental Bus System v. State Corporation Commission, 56 N.M. 158, 241 P. 2d 829 (1952). (See quotation from this case set forth below). And note the following statement from Ferguson-Steere Motor Company v. State Corporation Commission, supra:

> "It is well settled in this state that it is not the province of the trial court... to substitute its judgment for that of the agency."

It seems appropriate at this stage to point out to this Court that on page 24 of their Answer Brief Respondents note that the review statute in question "further requires the Court to enter its order either affirming, modifying or vacating the order of the Commission, and in lieu thereof to enter such order as it may determine to be proper." (Emphasis added)

Inasmuch as Respondents have injected this provision of the review statute into their Answer Brief, Relators feel it necessary to point out that this provision also is clearly unconstitutional as a violation of the separation of powers provision. This Court stated as follows in Transcontinental Bus System v. State Corporation Commission, supra:

> To permit the court to amend or modify an order of an administrative agency is repugnant to the fundamental law providing for separation of powers of executive, legislative and judicial departments of our government. The administrative board or tribunal acts in a legislative capacity and the trial court acts in a judicial capacity. To allow a court to amend or modify an order of our State Corporation Commission amounts to a substitution of the judgment of the court for that of the Commission and the court in such a case would be acting legislatively and not judicially." (Emphasis added)

As can be seen from the above, the review statute in question is completely permeated with unconstitutional provisions. It allows the court to conduct a trial de novo and take additional evidence; it provides that the court is to decide the case on a preponderance of the evidence both as to issues of fact and law; it further provides that the court may modify or amend the order of the Commission. Under principles of law firmly established in this jurisdiction all such provisions are unconstitutional. Yarbrough v. Montoya, supra; Transcontinental Bus System v. State Corporation Commission, supra; Ferguson - Steere Motor Company v. State Corporation Commission, supra.

Relators are not advocating administrative absolutism. Admittedly the right of review is essential as a check on administrative action. But the unconstitutional provisions of

the review statute can be struck down and yet the right of review preserved. This is the exact question that the Supreme Court of Mississippi had before it in California Co. v. State Oil and Gas Board, supra, and it so held.

REPLY TO POINT V OF RESPONDENTS' ANSWER BRIEF WHICH POINT IS AS FOLLOWS:

RESPONDENTS ARE ENTITLED TO A TRIAL DE NOVO AND AN INDEPENDENT DETERMINATION OF THE FACTS BECAUSE THEY ARE ALLEGING CONFISCATION OF THEIR PROPERTY IN VIOLATION OF ARTICLE II, SECTION 18 OF THE NEW MEXICO CONSTITUTION AND THERE IS NOT INVOLVED IN THE CASE ANY ISSUE OF WASTE WHICH WOULD BE PREVENTED BY THE COMMISSION'S ORDER.

At the outset it should be noted that this was not a Point in Relators' Brief-in-Chief. Respondents have thus interjected an entirely new issue into this case. They are apparently attempting to circumvent a determination by this Court as to whether the Dist Court can take additional evidence for the purpose of determining whether the Commission action was arbitrary, capricious, unreasonable, improper or unlawful by resort to a general allegation of "confiscation of property."

In this connection Respondents state at page 51 of their Answer Brief that

> "the respondents complain that the orders of the Commission deprives them of their property, that is the recoverable gas in place under their lands, or the right to recover such gas from under their lands."

Other similar statements with regard to "property rights" are interspersed throughout Point V and elsewhere in Respondents' Answer Brief. Referring to this same question, Respondents argue as follows at page 28 under Point III of the Answer Brief:

> "...the Commission in effect changed the ownership of the gas in the pool by allowing different operators to produce larger or smaller amounts of gas from the various tracts in the pool." (Emphasis added)

By these and other statements to the same effect, Respondents would have this Court believe that the "property" to which they refer is a definite and identifiable thing and that the Commission has presumed to try title to this property. This is a gross misstatement of the issues involved in this case and the role of the Commission therein.

The Commission has not attempted in any way to try title to the property of Respondents or of any other person. Nor does its Order have the effect of doing so. There was never any question in this case as to who owns the gas in place under any given tract in the pool. All are agreed that each property owner in the pool is entitled to the recoverable gas in place which underlies his property. In this connection Section 65-3-14(a), NMSA, 1953 Comp., clearly directs the Commission to afford each property owner the opportunity to produce the recoverable oil and gas underlying his property. This would be a simple task if there were some direct and accurate means of measuring the recoverable oil and gas under a given tract. Unfortunately, no such direct and accurate means of measurement exists. Consequently, it becomes necessary to resort to the indirect approach of considering the many factors which have a bearing on the amount of recoverable gas in place under a given tract such as porosity, permeability, viscosity, pressure, open flow potential, thickness of pay and the acreage involved.

After considering extensive testimony and evidence in this regard, the Commission ultimately adopted the pressure-production decline method of computing the remaining recoverable gas in place under each tract in the Jalmat Gas Pool. This is the real action of the Commission which Respondents challenge.

Throughout the numerous hearings before the Commission regarding this matter, Respondents attempted to discredit the pressure-production decline method of computation and urged that the pore volume method of computation was the more accurate of the two. Much of the evidence which Respondents intend to present in the District Court goes to this very question as is shown by their Offer of Proof (Exhibit E, Application for Writ of Prohibition).

Relators wish to make it clear that we are not here arguing the merits of one method of computation as compared with another, but are simply pointing out that the real controversy in this case is over the manner in which the recoverable gas under a given tract is to be measured rather than the ownership of this gas.

Erroneously assuming that they have here presented a case involving "confiscation" of property rights, Respondents proceed to announce what they claim to be the "rule" governing scope of review in such cases as follows (Answer Brief, p. 51):

> "...there is a well established rule of law that where constitutional questions are concerned, the court must try an action de novo and hear additional evidence on the questions presented. The leading case on the subject is that of Ohio Valley Water Company v. Ben Avon, 253 U. S. 287, 64 L. Ed. 908, 40 S. Ct. 527."

What Respondents fail to point out is that the Ben Avon case, decided in 1920 and the fountainhead of the "constitutional fact" doctrine, is no longer the law. Parker, Administrative Law 276-277 (1952). In fact, in no case since 1936 has the repudiated Ben Avon doctrine been applied by the United States Supreme Court. A host of cases have indicated a sharp departure. Federal Power Commission v. Hope Natural Gas Company, 320 U. S. 591, 64 S. Ct. 281, 88 L. Ed. 333 (1944); Railroad Commission v. Rowan and Nichols Oil Co., 310 U. S. 573, 60 S. Ct. 1021, 84 L. Ed. 1368

(1940); Colorado Interstate Gas Co. v. Federal Power Commission, 324 U. S. 581, 65 S. Ct. 829, 89 L. Ed. 1206 (1945); Interstate Commerce Commission v. Jersey City, 322 U. S. 503, 64 S. Ct. 1129, 88 L. Ed. 1420 (1944); New York v. United States, 331 U.S. 284, 67 S. Ct. 1207, 91 L. Ed 1492 (1947). These cases have rendered the Ben Avon doctrine an anachronism.

As Professor Davis states at page 868 of his treatise on Administrative Law (1951):

> "The long debate about de novo review versus restricted review is about ended; the Ben Avon and Crowell cases are of little interest except as history." (Emphasis added)

At another place (p. 860) the same author states that

> "later decisions make it clear that it [the Ben Avon doctrine] is no longer followed."

Mr. Justice Brandeis, along with Justices Cardozo and Stone, continued to argue for limited review in "confiscation cases" even when the Ben Avon doctrine was in vogue. The Court ultimately adopted the Brandeis view which he set out as follows in his concurring opinion in St. Joseph Stockyards Co. v. United States, 298 U. S. 38, 73, 56 S. Ct. 720, 80 L. Ed. 1033 (1935):

> "If in a judicial review of an order of the Secretary, his findings supported by substantial evidence are conclusive upon the reviewing court in every case where a constitutional issue is not involved, why are they not conclusive when a constitutional issue is involved? Is there anything in the Constitution, which expressly makes findings of fact by a jury of inexperienced laymen, if supported by substantial evidence conclusive, that prohibits Congress making findings of fact by a highly trained and especially qualified administrative agency likewise conclusive, provided they are supported by substantial evidence?" (Emphasis added)

The reason that the Ben Avon doctrine of "constitutional fact" has been discredited is not difficult to understand. It simply failed to work. As was stated in Staten Island Edison Corp. v. Maltbie, 270 App. Div. 55, 65, 58 N.Y. S. 2d 818, 826

(3rd Dep't 1948) (dissenting opinion), "It is a simple matter to allege confiscation in any rate matter." The same is true in any proration case. Thus the proceeding before the administrative agency was rendered useless since the petitioner could allege confiscation and thereby have the case completely retried in the court.

The following statement by Dickinson in Crowell v. Benson: Judicial Review of Administrative Determinations of Questions of 'Constitutional Fact,' 80 U. of Pa. L. Rev. 1055 (1932) sums up this objection to the Ben Avon doctrine:

> "It would be not merely inconvenient and burdensome to the courts, but altogether disruptive of administrative processes, to hold that every fact issue on which a claim of constitutional right can be made to depend becomes thereby entitled to a retrial on new evidence in a review proceeding at law. The reason is that under the broad interpretation now placed on the Fifth and Fourteenth Amendments there is practically no issue going to the substantial merits of a controversy which if 'unreasonably' decided by an administrative tribunal cannot be made the basis of a claim of constitutional right." (Emphasis added)

Mr. Dickinson concludes, as one must if he is to be both logical and realistic, that "all issues of importance committed to the discretion of administrative tribunals and which affect personal or property rights are thus capable of being translated into issues of constitutional fact."

The Interstate Commerce Commission was faced with this problem prior to passage of the Hepburn Amendments in 1906. Carriers against whom the Commission had made an order were entitled to a trial de novo in court of the fact issues decided by the Commission. The delays and expense were so intolerable as to defeat completely the purpose of the Interstate Commerce Act. A party provided with sufficient funds could prolong the

procedure by trial de novo and torpedo the administrative determination by withholding evidence until the court proceeding. The result was not merely to deprive administrative procedure of its advantage of speed but to bring the administrative body into disrepute as ineffectual. See Ripley, Railroads; Rates and Regulations 460-462; 1 Sharfman, The Interstate Commerce Commission 24-25 (1931).

Respondents feel that the phrase "constitutional right and power" contained in the dicta of Harris v. State Corporation Commission, supra, amounts to an endorsement by this Court of the Ben Avon-St. Joseph doctrine of "constitutional fact". But neither such case was cited by the Court in its opinion. In the unlikely event that such language did give a tacit stamp of approval to the Ben Avon doctrine, in the light of the fact that this doctrine has subsequently been completely discredited, no justification now exists for following it.

In summary Relators urge that the complicated fact determinations necessarily involved in the promulgation of any proration formula are not properly within the province of the courts. This is true even though "confiscation" is alleged. Railroad Commission of Texas v. Rowan and Nichols Oil Co., 310 U. S. 573, 60 S. Ct. 1021, 84 L. Ed. 1368 (1940). As Professor Larson so aptly stated in The Doctrine of Constitutional Fact, 15 Temple L. Q. 185, 220 (1941):

> "The oil proration problem...is one in which court review has been more inept and harmful than in almost any other field."

C O N C L U S I O N

Based upon the reasons and authorities cited in Relators' Brief-in-Chief and in this Reply Brief, Relators submit that the Alternative Writ of Prohibition heretofore issued should be made permanent by this Court.

Respectfully submitted,

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I certify that I mailed a copy of the foregoing Reply Brief to Respondent and to Resident Counsel of Record for Real Parties in Interest on December _____, 1958.

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